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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

[redacted]

IDA PHILLIPS,

Petitioner,

v.

MARTIN MARIETTA CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR HUMAN RIGHTS FOR WOMEN, INC. AS AMICUS CURIAE

SYLVIA ELLISON

Attorney, Human Rights for Women, Inc.

Mailing Address:

P.O. Box 7402
Ben Franklin Station
Washington, D.C. 20044

Washington, D.C. · THIEL PRESS · 202 · 393-0625

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IN THE

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OCTOBER TERM, 1969

No. 1058

IDA PHILLIPS,

Petitioner,

v.

MARTIN MARIETTA CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR HUMAN RIGHTS FOR WOMEN, INC. AS AMICUS CURIAE

QUESTION PRESENTED

Whether, under Title VII of the Civil Rights Act of 1964, an employer may refuse to hire women with pre-school age children while hiring men with pre-school age children.

INTEREST OF HUMAN RIGHTS FOR WOMEN, INC.

Human Rights for Women, Inc. is a non-profit tax exempt organization, which was incorporated in the District of Columbia in December 1968. One of its purposes is to pro-

vide legal assistance without charge to women seeking to invoke their rights under the Constitution and statutes of the United States, particularly Title VII of the Civil Rights Act of 1964, relating to equal employment opportunity. A major portion of HRW's efforts and financial resources have been devoted to furnishing free legal counsel for women in Title VII cases.

Human Rights for Women is deeply concerned with a clear and proper interpretation of Title VII as it applies to sex dsicrimination and with equal protection of the law for women. The decision of the Fifth Circuit in this case endangers the protection of nondiscrimination legislation for women and for all discriminated-against classes. HRW believes that the Fifth Circuit has confused and misinterpreted Title VII by holding that it permits the refusal to hire an individual who possesses the characteristics of being (a) a female and (b) a parent of pre-school age children. This case presents a unique opportunity to clarify and define what prejudice and discrimination really mean and the scope of the proscriptions of the Federal statute prohibiting discrimination in employment.

STATEMENT

Martin Marietta Corporation refused to hire Ida Phillips for the position of assembly trainee, advising her that the company does not consider female applicants with pre-school age children for such position, although male applicants with such children are considered. (Pet. App. 2a) Mrs. Phillips complained that her rights under Title VII of the Civil Rights Act of 1964 had been violated. (78 Stat. 241, 253, 42 U.S.C. 2000e *et seq.*)

The District Court struck the portion of the complaint alleging discrimination against women with pre-school age children and then granted the company's motion for summary judgment based on an uncontroverted showing that a

larger percentage of women applicants than men applicants were hired for the position of assembly trainee. (Pet App. 5a-6a)

The Court of Appeals affirmed, reasoning that a violation of Title VII—

> can only be discrimination based solely on one of the categories i.e. in the case of sex; women vis-a-vis men. When another criterion of employment is added to one of the classifications listed in the Act, there is no longer apparent discrimination based solely on race, color, religion, sex or national origin. (Pet. App. 8a-9a)

The Court of Appeals further explained its theory of Title VII as follows:

> The discrimination was based on a two-pronged qualification, i.e., a woman with pre-school age children. Ida Phillips was not refused employment because she was a woman nor because she had pre-school age children. It is the coalescence of these two elements that denied her the position she desired. (Pet. App. 9a-10a)

A petition for rehearing was denied, with Chief Judge Brown, joined by Judges Ainsworth and Simpson, dissenting from the denial. (Pet. App. 12a-13a)

ARGUMENT

We agree with dissenting Chief Judge Brown of the Fifth Circuit that if the above quoted "sex plus" interpretation of Title VII is permitted to stand, "the Act is dead." (Pet. App. 18a) We submit that the Court of Appeals interpretation of Title VII is wrong for the following reasons:

1. If sex is even *one* element considered in hiring an individual no matter how it coalesces with other job criteria (relevant or irrelevant) the proscriptions of Title VII are violated.

The very essence of fair employment legislation is to require the exclusion from consideration of the characteristics designated in the statute, e.g. sex, race. Section 703 (a) of the Civil Rights Act of 1964 (42 U.S.C. 4000e-2(a)) makes it an unlawful employment practice for an employer

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; * * *

Race, color, religion, sex, and national origin are thereby *excluded* as permissible job qualifications. The employer and all his employment policies must in effect be blind to each of these characteristics of the individual applicant or employee.

Any other interpretation subverts the very purpose of the law. If the addition of a second qualification to a protected class can exempt an employer policy or practice from the prohibitions against nondiscrimination, then Catholics with more than two children can be discriminated against, blacks can be required to pass a special stringent test to qualify for a job, and Spanish-surnamed Americans can be required to have PhD's in English. Any employer could easily dream up ways to continue to give job preference to a favored class (e.g. white males) by adding a job qualification, relevant or irrelevant, for applicants of the protected classes he wishes to exclude.

The only qualification to the rule of Title VII that sex may not be an element singly or combined with other requirements in job considerations is contained in Section 703(e) of the Act (42 U.S.C. 2000e-2(e)), which provides

that it is not unlawful to hire or employ employees on the basis of the employee's sex (or religion or national origin)—

> in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

Under this provision, if *maleness* is necessary to the performance of particular work, a woman need not be considered. Martin Marietta did not claim that sex (maleness) was a BFOQ and it is obvious that being male could not possibly be a BFOQ since "75 to 80 percent of those holding the positions [of assembly trainee] were *women*." (emphasis supplied). (Pet. App. 6a)

2. Title VII prohibits pre-judging an individual on the basis of sex by making a generalized assumption about women.

The Equal Employment Opportunity Commission's "Guidelines on Discrimination Because of Sex" specifically state that the following is a violation of Title VII (i.e. is not a BFOQ):

> The refusal to hire a woman because of her sex, based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men. 29 CFR 1604.1(a)(1)(i)

Under this rule, which we submit is correct, even if it could be proved (and it has been neither claimed nor proved) that women who are parents of pre-school age children are absent from work more often than men who are parents of such children, an assumption that an individual woman would likely follow that pattern is a forbidden basis for refusing to hire her. Fair employment legislation prohibits making a generalization about a protected class. Women, blacks, Jews, etc. must be treated as individuals and not be saddled with presumed generalized characteristics.

The EEOC guidelines also describe as unlawful—

> The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group. 29 CFR 1604.1(a)(1)(ii).

Employer policies that presume inabilities of women as a class to perform certain work have been held violative of Title VII. Thus the U.S. Court of Appeals for the Seventh Circuit reversed a District Court ruling that approved (as a BFOQ) an employer practice of allowing only men to work on jobs requiring the lifting of 35 pounds or more. *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (C.A. 7, 1969). In that case the court stated that Colgate—

> must notify all of its workers that each of them who desires to do so will be afforded a reasonable opportunity to demonstrate his or her ability to perform more strenuous jobs on a regular basis. Each employee who is able to so demonstrate must be permitted to bid on and fill any position to which his or her seniority may entitle him or her. 416 F.2d at 718.

The Fifth Circuit held in *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (C.A. 5, 1969), that a 30-pound weight lifting limitation on women workers does not make being a male a BFOQ, nor does the desire to "protect" women from having to work at night. The court pointed out—

> Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase

> in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on an equal footing. We cannot conclude that by including the bona fide occupational qualification exception Congress intended to renege on that promise (408 F.2d at 236).

Similarly, in ruling that an Oregon weight lifting limitation on women workers violates Title VII, the court in *Richards v. Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969), stated:

> Except in rare and justifiable circumstances, 42 U.S.C. § 2000e-2(e), the law no longer permits either employers or the states to deal with women as a class in relation to employment to their disadvantage. 29 CFR § 1604.1(a). Individuals must be judged as individuals and not on the basis of characteristics generally attributed to racial, religious, or sexual groups. 300 F. Supp at 340.

See also, *Cheatwood v. South Central Bell Tel. & Tel. Co.*, 303 F. Supp. 754 (N.D. Ala., 1969); *Rosenfeld v. Southern Pacific Company*, 292 F. Supp. 1219 (C.D. Calif.) appeal pending in Ninth Circuit; *Tuten v. Southern Bell Telephone Co.*, 2 FEP Cases 299 (M.D. Fla. 1969).

Thus, courts of appeals and district courts have approved the EEOC Guidelines on Sex Discrimination and interpreted the prohibitions against sex discrimination in Title VII as prohibiting general assumptions about the inabilities of women to meet certain *job qualifications*. 29 CFR 1604.1 (a)(ii). Certainly, general assumptions about *employment characteristics* (*ibid.*, subparagraph (i)) are likewise prohibited. Indeed, unlike job qualifications, where there are (though very few) instances in which sex itself is a BFOQ.[1]

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[1] The EEOC Guidelines state: "Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress." 29 CFR 1604.1(a)(2).

[continued]

there is no comparable qualification in the law that an employer could use as a defense for a discriminatory generalization based on presumed employment characteristics of women. Any assumption that a female applicant who is a parent of pre-school age children would have less desirable employment characteristics than a male applicant who is a parent of such children is absolutely forbidden by Title VII. Such pre-judging of an individual is what prejudice *is*.

3. Employer policies as to job requirements may not differentiate on the basis of sex, nor discriminate against women.

Employers are of course free to adopt any employment policy, practice or rule consistent with law. To be consistent with Title VII any employment policy or practice—such as a policy of excluding persons who are parents of pre-school children—must be applied without regard to race, color, religion, sex, or national origin. Martin Marietta's policy in this case was applied only to female parents and not to male parents. It obviously differentiates on its face, on the basis of sex, and thereby violates the rights of women under Title VII. The Fifth Circuit has held that even where an employer rule or policy is neutral on its face, if it operates to discriminate against a protected class under Title VII (*e.g.*, women) the rule or policy must be changed unless there is an overriding legitimate non-racial (non-sex

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The BFOQ provision is *not* an exception in the normal sense of the term. It was not meant to undermine the basic prohibition of the Act and permit sex discrimination in employment. It is a mere clarification, which points out that sex may be relevant to employment in an extremely limited number of instances where "maleness" or "femaleness" is a job requirement. Where an employment classification or system is discriminatory, it is not "bona fide." See *Local 189 v. U.S.*, 416 F.2d 980, 988, and *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505, 517 (E.D. Va. 1968). Therefore the BFOQ provision creates no exception to Title VII and cannot be used as a defense to a system of sex discrimination in employment as such system is not "bona fide."

based) business purpose. See *Local 189, Papermakers and Paperworkers v. United States*, 416 F.2d 980, 989 (C.A. 5), cert. denied, 38 L.W. 3320; *Local 53, Int. Ass'n of Heat & Frost I.&A. Wkrs. v. Vogler*, 407 F.2d 1047, 1054 (C.A. 5). For instance, in *Local 189*, it was pointed out that under the "business necessity" principle an employer could require that employees placed in secretarial positions be able to type even though the requirement might mean the exclusion of disadvantaged black persons who had not had training in this field. (416 F.2d at 988-989).

In *Local 53, supra*, the court held that a nepotism system, neutral on its face, but used to exclude black employees from jobs, was a discriminatory system which could not be defended on the ground of "business necessity", even though there might be some incidental business advantages in using the system.

The "business necessity" argument thus comes into play only where a neutral rule, nondiscriminatory on its face, incidentally operates against a protected class (blacks or women) but for overriding business reasons rationally related to the duties involved in the job the rule is shown to be nondiscriminatory and thus not violative of the Act. Under no circumstances has any court held that business necessity can justify a discriminatory effect of an employment practice—and the whole issue cannot arise where the employment practice discriminates on its face, as in the instant case. It is not even relevant here.

To recapitulate, for an employer practice to be valid as a " business necessity"under Title VII, it would have to be all of the following:

(1) *Neutral on its face. E.g.*, if the policy applied with respect to single (divorced, widowed) *parents* of pre-school age children rather than to mothers, it would be neutral on its face.

(2) *Not discriminatory against women (or blacks) in its operation. E.g.*, if it is shown that more women than men

without spouses had the custody and care of pre-school age children, such neutral policy would operate to discriminate against women and would be violative of Title VII.

(3) *The policy itself must be relevant to the requirements of the job.* Parenthood obviously could not be. But a certain rate of absenteeism could be. Therefore, instead of assuming that parents will have a high rate of absenteeism, the policy must be *tailored to the job requirement, i.e.*, employees must comply with certain attendance rate requirements.

(4) *The policy must be applied on an individual basis and not on the basis of sex (or race, etc.)* Assuming, *arguendo*, that it could be shown that blacks or women as a class had a poorer attendance record, no such class presumption can be made with respect to an individual black or woman. This is the very kind of class pre-judging that Title VII forbids.

4. The Court of Appeals interpretation of Title VII would nullify the protection of the law for the persons who are in greatest need of its protection.

The purpose of Title VII of the Civil Rights Act of 1964 is to protect women and other classes from employment discrimination. Statistics on employment and earnings of women, as compared to men show that discrimination on the basis of sex inflicts the most severe economic damage on its victims and that, as a group, women heads of household with children to support suffer most.

Nearly half of all women 18 to 64 years of age are in the labor force. (Monthly Statistics on the Woman Labor Force, data for May 1968, U.S. Dept. of Labor.) Women with 1 to 3 years college earn less ($3714 for white women, $3706 for nonwhite women) than men with an eighth grade education (white men: $5184; nonwhite men: $4261). White women with 4 or more years of college earn less ($5301) than nonwhite men with only a high school education ($5721). Nonwhite women with 4 or more years of

college are better off ($6275) than white women ($5301), but nonwhite women are at the bottom in all lesser educational categories. The white male earns the most of all at all educational levels, a long standing privileged position with sex and race discrimination shielding him from fair competition. (Statistics for 1968, from U.S. Dept. of Commerce, Bureau of the Census; CPR-60, No. 66, Table 41.).

Eleven percent of American families are headed by women; 35% of these families live in poverty; 61% of the Nation's poor children live in families headed by women. (U.S. Dept. of Labor, "Fact Sheet on the American Family in Poverty", April 1968).

Women as a class, and especially women who are responsible for the support of children are in the greatest need of protection against discrimination afforded by Title VII. The ruling of the Fifth Circuit in this case judicially approves a discriminatory policy of a private employer and places women in the eyes of the law in a worse position than before the enactment of Title VII. Prior to Title VII, such private discrimination at least did not have the sanction of Federal law. Such a construction of Title VII cannot be permitted to stand.

CONCLUSION

The decision below should be reversed and remanded with instructions that judgment be entered for the plaintiff.

Respectfully submitted

SYLVIA ELLISON

Attorney, Human Rights for Women, Inc., as Amicus Curiae